IN THE

Supreme Court of the United States

October Term 1945

No. 429

MOSES B. SHERR,

Petitioner,

against

ANACONDA WIRE & CABLE COMPANY and
UNITED STATES OF AMERICA,

Respondents.

BRIEF FOR ANACONDA WIRE & CABLE COMPANY IN OPPOSITION TO PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SECOND CIRCUIT

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Opinions Below

The opinion of the United States District Court for the Southern District of New York (R. 47-54) is reported in 57 Federal Supplement, 106. The *per curiam* opinion of the Circuit Court of Appeals for the Second Circuit (R. 60-62) and the concurring opinion of Circuit Judge Clark (R. 62) are reported in 149 Federal Reporter, (2d), 680.

Statement

The action was instituted as the result of publicity given to an indictment secured by the Department of Jus-

tice against the respondent Company and others and is founded upon information secured by activities of the Department of Justice, in the course of which the appellant took no part.

The statute under which the action was brought was amended December 23, 1943. On March 4, 1944, the Attorney General filed a notice of appearance in this action. Thereafter, by notice of motion dated April 3, 1944, appellant moved to strike the notice of appearance filed by the Attorney General and for permission to prosecute the action.

On May 16, 1944, the Attorney General moved to stay the action pending the determination of another action for the same relief instituted by the United States. In the same motion the Attorney General moved for an order declaring that the action was based upon evidence or information in the possession of the United States or agencies, officers or employees thereof at the time it was brought, basing the latter motion upon an affidavit of the Honorable Francis M. Shea, Assistant Attorney General (R. 14-21).

Respondent Anaconda Wire & Cable Company, by motion dated May 20, 1944, moved to dismiss the action upon the ground that the Court was without jurisdiction, it appearing that the action was founded upon information in the possession of the Department of Justice at the time the action was commenced and that, therefore, under the provisions of the amended statute, the Court could not proceed further with the case.

The motions of petitioner and the respondents came on to be heard together before Judge Leibell on June 2, 1944, and were decided together, with an opinion (140-162).

The District Court granted the motion of the respondent Anaconda Wire & Cable Co. to dismiss the action and the motion of the Attorney General to declare that the action was founded upon information in the possession of the United States; it denied the motion to strike the appearance of the United States and the motion to stay the action. The Court of Appeals for the Second Circuit affirmed.

Petitioner concedes that, under the provisions of the statute, as amended, the District Court was required to dismiss this action, but seeks to raise a constitutional question as to the effect of the amendment on pending suits.

Petitioner thus does not challenge the constitutionality of the amendment as a whole but merely that portion withdrawing the jurisdiction of the District Courts in pending actions based upon evidence or information in the possession of the United States at the time of their commencement.

Any suggestion (Petition, pp. 10 and 11) that this petition raises any broad question as to the constitutionality of the amendment would be without foundation.

In *Marcus* v. *Hess,* 317 U. S. 537, the Attorney General unsuccessfully urged upon this Court that non-informing relators, such as the relator in the present case, were not entitled to institute such actions upon the basis of information discovered by agencies of the Government. The Court rejected this argument, stating "The trouble with these arguments is that they are addressed to the wrong forum" (317 U. S. 547). Thereafter, the arguments were addressed to Congress and Congress took cognizance of the situation and passed Public Law No. 213, of the 78th Con-

gress, approved December 23, 1943. Under the provisions of the amended statute, the jurisdiction of the District Court was withdrawn in actions such as the present one, which were commenced upon information in the possession of the United States and as to other actions, which were permitted to continue, the Attorney General was given broad power to intervene and direct the prosecution of such actions. The purpose of the legislation was remedial and designed to do away with a growing abuse, which was calculated to interfere with the functioning of the Department of Justice.

Questions Presented

The sole question here is whether the Fifth Amendment to the Constitution forbade Congress to withdraw the jurisdiction of the District Courts in pending actions begun by non-informing relators to recover damages accruing to the United States where the basis of the action was information and evidence secured by the United States independently of such persons. No other question is or can be raised by this petitioner.

The decision of this question would involve only a limited question as to the constitutionality of the amendment affecting a few pending cases. On the grounds urged by petitioner, a review of the constitutionality of the statute could not determine the effect of the statute upon actions which may be brought in the future under a different provision of the statute.

There is no conflict between the decision below and the decisions of this Court or of other Circuit Courts of Appeal.

There is no peculiar or original question involved which is not already controlled by existing decisions of this Court. The question propounded by the petitioner is not novel. It was not reserved in *Nathanson* v. *U. S.*, 321 U. S. 746, as suggested by petitioner, so far as appears from any language of this Court, and this question has been repeatedly answered in the negative by this Court and by the courts of the various states. There is no authority to support such a proposition and there is a long unbroken line of authorities against it.

Reasons for Denying the Writ

The institution of a *qui tam* action *per se* creates no rights in the *qui tam* plaintiff merely by reason of the institution of the action.

The False Claims Statute before amendment was a procedural or remedial statute which afforded an opportunity to informers to earn a reward by prosecuting an action successfully to judgment.

Such a statute afforded no basis for any claim of contract between the Sovereign and one availing himself of the opportunity under the statute which would estop the Sovereign from amending or repealing the statute so as to withdraw the opportunity.

A vested property right, if any, could arise only upon the entry of a judgment in favor of the *qui tam* plaintiff and the right would then be only in the judgment, not in the statute. Until that time, relator's interest was an inchoate expectancy dependent upon the statute and subject to whatever changes the legislature might make in the statute.

An offer of a reward or an offer of a bounty would create no contract between the offerer and one who took steps to earn the reward or bounty but had not yet performed, even if the offerer were a private person.

As Circuit Judge Clark pointed out (R. 62), the statute afforded no basis for a contract between the petitioner and the Sovereign. It was only a method of law enforcement by private individuals under the stimulus of a reward for successful accomplishment, but with nothing to prevent the Sovereign from resuming enforcement itself before the reward had been earned.

The Sovereign could repeal the statute and put an end to the jurisdiction of the District Court without any possibility of estoppel.

There could be no vested right in the statute nor any power to compel specific performance of a contract to act as plaintiff to earn a reward. The statute had for its purpose the protection of the people of the United States and not the creation of private rights and the Congress had paramount power to amend or repeal.

Any question of compensation, if there were any incidental or collateral private right created, cannot affect or impair the power of the Sovereign to repeal or amend the statute and no constitutional question can be raised thereby with respect to the amendment.

Petitioner wholly fails to meet the test of the uniform rule laid down "by an unbroken line of decisions, from Chief Justice Marshall to the present day • • • that every possible presumption is in favor of the validity of an act of Congress until overcome beyond rational doubt" (*Adkins* v. *Children's Hospital*, 261 U. S. 525).

POINT I

A *qui tam* plaintiff under the false claims statute acquired no vested or property right by the commencement of the action.

The institution of a *qui tam* action created no vested right in the relator and the amendment or repeal of the statute is as effective with respect to pending actions as it is with respect to claims upon which no action has been brought. (*Norris* v. *Crocker,* 13 How. 429; *Maryland* v. *B. & O. R. R.,* 3 How. 534; *Gulf, Colorado & Santa Fe R. R.* v. *Dennis,* 224 U. S. 503; *Yeaton* v. *U. S.,* 5 Cranch. 281; *Flanigan* v. *Sierra County,* 196 U. S. 553; *U. S.* v. *Connor,* 138 U S. 61; *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Cushman* v. *Hale,* 68 Vt. 444; 35 Atl. 382; *Mix* v. *Illinois Central R.R. Co.,* 116 Ill. 502; *Commonwealth* v. *Welch,* 32 Ky. 330.)

In *Norris* v. *Crocker,* 13 How. 429, the action was to recover the statutory penalty for harboring a runaway slave. The statute was repealed during the pendency of the action. This Court said:

> "As the plaintiff's right to recover depended entirely on the statute, its repeal deprived the court of jurisdiction over the subject-matter. And in the next place, as the plaintiff had no vested right in the penalty, the legislature might discharge the defendant by repealing the law."

In *Flanigan* v. *Sierra County,* 196 U. S. 553, the action was to collect a business license fee which accrued to a county under a statute. The statute was repealed during the pendency of the action. The action related to a period during which the license statute was in effect. This Court

held that the repeal of the statute repealed the power to collect licenses accruing even during its life, quoting with approval from *City of Sonora* v. *Curtin,* 137 California 583, as follows:

> "In speaking of the rule as to enforcements of rights under repealed statutes, Endlich on the Interpretation of Statutes [sec. 480], says: 'The same rule applies to rights and remedies founded solely upon statute, and to suits pending to enforce such remedies. If at the time the statute is repealed, the remedy has not been perfected or the right has not become vested, but still remains executory, they are gone.' " (196 U. S. 553, at p. 561)

The decisions of the state courts are unanimous in holding that the commencement of a *qui tam* action creates no vested right in the informer. *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475; *Cushman* v. *Hale,* 68 Vt. 444; *Allen* v. *Farrow,* 2 Bailey, 584 (S. C., 1831); *Coles* v. *Madison County,* 1 Breese 115 (Illinois, 1826); *State* v. *Tombeckbee Bank,* 1 Stew. 347 (Alabama, 1828); *Commonwealth* v. *Welch,* 2 Dana 330 (Kentucky, 1834).

In *Allen* v. *Farrow,* 2 Bailey 584 (S. C., 1831), the action was under a *qui tam* statute providing treble damages for the taking of usurious interest "one half to the use of the State 'and the other half to him or them, that will inform and sue for the same.' " During the pendency of the action, the statute was repealed. The argument for the plaintiff was in almost the identical words advanced by the relator in the present case. Plaintiff's counsel stated:

> "A *qui tam* action is founded upon an implied contract, the benefit of which vests in the plaintiff by the commencement of the suit, and cannot be divested

without his consent. 3 Bl. Com., 160-1. And the contract in cases of this character, must, like all other contracts, take effect according to the law at the time when it was entered into. * * * The state may unquestionably release its own claims, but if it has transferred them to another, it has lost control over them. The plaintiff has given a consideration for the forfeiture, by incurring the costs of this action; and the State cannot violate its contract with him, by subsequently releasing the forfeiture."

The Court held that the repeal of the statute outlawed the action, stating:

"The plaintiff's counsel have relied on the ground, that as soon as the offence was committed, and proceedings were instituted for the recovery of the penalty, a right vested in the plaintiff, which the Legislature could not take away by the act of 1830. I cannot admit the correctness of this proposition. The farthest that the argument can be legitimately extended, would be, that an inchoate, or imperfect, interest commenced. The right itself had not vested, nor do I conceive that it could vest, until the money was received. Up to that time, it was under the control of the law. It is a power delegated by law, as I conceive, to sue for the use of the State, and for himself; and the same authority, which delegated that power, could revoke it at any time before its final execution." * * *

"The deduction to be drawn from all these cases, I think is, that the statute, under which the penalty is sought to be recovered, must be of force at the rendition of the judgment: and if this be the true principle, it follows necessarily, that if there be no law, the Court can render no judgment. And this view is further illustrated by the well established practice, that a declaration for a penalty, given by stat-

> ute, must conclude 'against the form of the statute;' 1 Gallison, 26, 2 East, 333: and at the trial the question presented is the existence of such a statute. If there be none, the Court can have no authority for its judgment."

Similarly, in *Coles* v. *Madison County,* 1 Breese, 115 (Illinois, 1826), the Supreme Court of Illinois held that a county might not recover a penalty for bringing slaves into the state without giving bond upon their liberation when judgment was not entered upon its claim prior to the repeal of the statute imposing the penalty. The Court rejected the claim that the repealing statute was an *ex post facto* law. In discussing the claim of the County, similar to the claim asserted by the relator here of a vested property right, it stated:

> "It is said that the king cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true, that the parliament can. It is not pretended that the executive could remit the penalty in this case, but that the legislature may. * * * But 'it is not in doubtful cases, or upon slight implications, that the court should pronounce the legislature to have transcended their powers.' In the present case, I am clearly of opinion, they have not done so. The law under consideration is not an *ex post facto* law, because the generally received, and well settled import of the term, is not applicable to a law of this character. It impairs the obligation of no contract, for the conclusive reason that no contract ever existed, and for the same reason, it cannot be said to destroy a vested right."

In *Bank of St. Mary's* v. *State of Georgia,* 12 Ga. 475, Judge Lumpkin stated the rule as follows:

> "We are clear, both upon principles and precedent, that a penalty cannot be recovered, after the expiration of the law which imposes it, either by its own limitation, or a repeal by the power which enacted it, without an express provision to that effect, in the repealing Statute; and that it makes no difference whether the penalty, when recovered, goes entirely to the public or to the informer, or whether, as in this case, it is divided between them." (p. 481)

and (pp. 494-495):

> "We fully and unanimously concur then, in the following conclusions: that the authorities cited, abundantly sustain the position, that an informer who *commences* suit under a penal Statute, does not acquire thereby a *vested right;* * * * and that it is perfectly within the legislative competency to pass such repealing Statutes before *final judgment.*"

In *Cushman* v. *Hale,* 68 Vt. 444, 35 Atl. 382, the informers' statute was repealed after conviction and sentencing and while the fines imposed were being appealed. The Court held that the repeal of the statute granting one fourth of the fines to the prosecuting officer deprived him of any right in the amounts collected after the repeal of the statute upon the basis of the conviction obtained before its repeal.

As to whether a statute creates a contract right, this Court considered the question in *Welch* v. *Cook,* 97 U. S. 541 (1878), where was held that an act of exempting from general taxes for ten years any property used in the District of Columbia for manufacturing purposes created no vested rights. This the Court said:

> "does not create a contract in the sense that it can not be repealed. * * * The exemption of manu-

> facturing property * * * was a bounty merely revocable at any time by the legislature." (pp. 542-543)
>
> "Nor are we able to see that this action involves a breach of faith towards the owner of the manufacturing property. Conceding, as the plaintiff must and does, that the exemption of his property was of the bounty of the legislature, he knew when he accepted it that it was liable to be revoked whenever either the local legislature or Congress should be of the opinion that the public interests demanded such action." (p. 545)

It is settled law that no estoppel runs against the sovereign which will prevent it from withdrawing a proferred bounty at any time.

As a matter of fact, the so-called "bounty cases" would seem to present stronger equities in favor of those plaintiffs than of this one, since in most instances the plaintiffs expended substantial sums in expectation of profiting by the statutory bounty. The cases are uniform in holding that such statutes may be repealed at any time prior to actual payment without incurring liability to the claimants.

In *Salt Company* v. *East Saginaw,* 13 Wall 373 (1871), a Michigan statute offered a bounty for every bushel of salt manufactured from water obtained by boring in the state by persons or corporations engaged in manufacturing salt and exempted from taxation property so used.

Plaintiff sought to enjoin the levy of a tax on its real estate upon repeal of the bounty law contending that the exemption from taxation was a vested right. This Court held that the original act was

"a bounty law, and nothing more; a law dictated by public policy and the general good, * * * Such a law is not a contract except to bestow the promised bounty upon those who earn it, so long as the law remains unrepealed." (p. 377)

"In short, the law does not, in our judgment, belong to that class of laws which can be denominated contracts, except so far as they have been actually executed and complied with. There is no stipulation, express or implied, that it shall not be repealed. General encouragements, held out to all persons indiscriminately, to engage in a particular trade or manufacture, whether such encouragement be in the shape of bounties or drawbacks, or other advantage, are always under the legislative control, and may be discontinued at any time." (p. 379)

Petitioner seeks to distinguish the *Salt Company* case by the argument that the Salt Company upon the repeal of the tax exemption which was supposedly its incentive to manufacture salt could discontinue its operations. The relator argues that having commenced his suit he was committed to carry it to judgment and that, hence, it cannot now be argued that his relationship, if any, to the United States was terminable at the will of either of the parties.

Relator's argument is based upon the provision of the original false claim statute that an informer commencing an action could not thereafter withdraw or discontinue without the consent of the court. However, this did not commit a relator to carry an action on to judgment. It was presumably designed to prevent misuse of the statute for purposes of extortion. After an action had been instituted, a *qui tam* plaintiff cannot be compelled to prosecute it. Anyway, if he were so obligated, the amendment to the

statute of which he complains terminated the obligation and relieved him of any further responsibility.

See also *Wisconsin & Michigan Ry. Co.* v. *Powers*, 191 U. S. 379 (1903).

Vail v. *Denver Building and Construction Trades Council*, 108 Col. 206; 115 Pac. 2d 389 (1941).

To support his claim of a vested right, petitioner quotes from the Year Books and from Coke and Blackstone to the effect that upon the commencement of a *qui tam* action the King may no longer discharge the whole penalty. The answer to this contention is as the Court stated in *Coles* v. *Madison County*, 1 Breese 115: "It is said that the King cannot remit an informer's interest in a popular action after suit brought; this is no doubt true, but it is equally true that the parliament can." This distinction between the powers of the executive branch of the Government and the legislative branch is stated in Blackstone as follows (2 Blackstone 436 [Ch. 29, Wendell's Edition 1847]):

> "He obtains an inchoate imperfect degree of property by commencing his suit; but it is not consummated till judgment; for, if any collusion appears, he loses the priority he has gained. But, otherwise, the right so attaches in the first informer, that the king (who, before action brought, may grant a pardon which shall be a bar to all the world) can not, after suit commenced, remit any thing but his own part of the penalty. For, by commencing the suit, the informer has made the popular action his own private action, and it is not in the power of the crown, *or of any thing but Parliament*, to release the informer's interest. This, therefore, is one instance where a suit and judgment at law are not only the means of recovering, but also of acquiring property." (Italics ours.)

In accord: Bacon's Abridgement, Vol. 1, p. 88 (Wilson Edition, 1851).

The decision in *Couch* v. *Jefferies*, 4 Burr. 2460, was cited by the claimant in *Coles* v. *Madison County*, 1 Breese 115, and disposed of by the Court there as follows:

> "In the case of *Couch qui tam* v. *Jeffries* (4 Burrow 2460), Lord Mansfield placed his opinion on the intention of the legislature, which he believed, was not to do injustice to the plaintiff, by subjecting him to costs. So, too, in *Dash* v. *Van Kleeck*, 7 Johns. 577, the same ground was assumed. The court did not intend to decide that the legislature could not pass a retrospective law, but that the one under consideration was not necessarily retrospective, and therefore ought not to receive that construction."

There is no room to question the intent of Congress in the statute under consideration here and petitioner admits there is no question of construction involved.

In taking this step, Congress closely followed what parliament had found necessary some three hundred years before, when by statute of 21 Jac. Ch. 4, it decreed that "information &c. upon penal statutes are to be heard and determined in their proper counties and not in the courts at Westminster, whereby the vexatious swarm of informers who are best trusted where they are least known are vanished and turned again to their former occupations" (Coke's Institutes, Park 4, p. 76).

United States v. *Griswold*, 24 F. 316, stands merely for the proposition that once judgment has been entered in a *qui tam* action, the plaintiff becomes entitled to a specific portion thereof and his right to collect that specific sum may not be abridged. There judgment had been rendered

against the defendant for some $23,000. The Court held that the judgment in which the relator had a half interest could not be compromised by the United States Treasury. The substance of the court's holding appears in the following language (30 Fed. 762):

> "His [the relator's] right of property in this part of the judgment, and his one-half of the judgment recovered for forfeiture and damages, was as absolute, and perfect, *after he had performed all the statutory conditions*, as his right to any other piece of property could possibly be. * * *" (p. 763) (Italics supplied)

Plaintiff's claim of a vested right is irreconcilable with the paramount right of the United States itself to proceed in actions of this type. This right was recognized before the amendment to the statute.

United States v. *Baker-Lockwood Mfg. Co.*, 138 F. (2d) 48 (C. C. A. 8th, 1943), the district court had refused to stay the prosecution of a *qui tam* action pending the trial of an action subsequently begun by the Government upon the same facts. The Circuit Court of Appeals, in reversing the decision of the district court, held that the protection of the public interest could not be made to depend "upon the outcome of 'the miserable race' to the court house," and, in reversing the order of the district court and directing that the actions brought by the two relators be stayed, held "that in the circumstances disclosed by the record before us the United States is entitled to precedence in the trial of a civil action over those actions brought by the informers." The relators petitioned for certiorari to the Supreme Court and, in the interim, the amendatory

statute became effective. The Supreme Court remanded the case to the District Court:

> "• • • with directions to proceed in conformity with the Act of December 23, 1943 • • • but without prejudice to the consideration of any questions which petitioner may have to raise as to the validity or application of that Act." *Nathanson* v. *United States,* 321 U. S. 746-747 (1944).

Petitioner cites *Russell* v. *Sebastian,* 233 U. S. 195 (1914) from which it appears that Section 19 of Art. XI of the California Constitution granted permission to any corporation incorporated for the purpose to use the public streets of any municipality having no comparable public works for the purpose of laying pipes to furnish water and light to the municipality and to its inhabitants.

In 1911, Section 19 of Art. XI of the California Constitution was repealed. The City of Los Angeles forbade a lighting company which already had extensive facilities and many customers to extend its facilities through new streets without first acquiring an express grant from the municipal authorities.

This Court held:

> "It cannot reasonably be contended that the relator is obliged to apply for a new grant whenever a new street is opened or an old one extended, as would be the case if the consent applied only to the situation existing when made. *When the right to use the streets has been once granted in general terms to a corporation engaged in supplying gas for public and private use, such grant necessarily contemplates that new streets are to be opened and old ones extended from time to time, and so the*

privilege may be exercised in the new streets as well as in the old." (pp. 209-210) (Italics ours.)

The *Russell* case affords no analogy. In the *Russell* case, the lighting company was acting not as agent for the state nor for any other agency, but had acquired a grant from the state. The Court construed the original grant as including the use of all of the streets in the municipality, both those in existence at the time of the grant and those subsequently opened, so that the lighting company's rights became vested when it satisfied the requirements of the original constitutional provision and the holding is merely that such property rights could not be subsequently affected.

POINT II

No contract between petitioner and the United States arose out of the commencement of this action.

Sherr began this action, in haste, immediately upon learning of his opportunity from the newspapers, in the hope of an ultimate gain. It was obvious however at that time from the plain language of the then provisions of Section 3493 of the Revised Statutes that he could not realize any gain unless he prosecuted the action to final judgment and enforced the judgment.

Although the Statute was construed in *Marcus* v. *Hess* to afford a person who was not an informer to prosecute an action under the statute, no inducement was ever found in the language of the statute itself, or as construed by the courts, which suggests any reward or inducement for the mere commencement of an action. No compensation was offered to anyone. Those who successfully prosecuted

claims which were reduced to judgment could collect and retain one half the forfeiture and damages. Section 3493 of the Revised Statutes explicitly provided that the informer's share was one half of the forfeiture and damages "he shall recover and collect." No other reward or inducement was held out.

Assuming *arguendo* that this statute constituted an offer (which it did not), the offer was not accepted.

Petitioner cites Williston on Contracts (§§60-60A) and the Restatement of Contracts (§§31, 45) in support of a proposition that an offer of a unilateral contract becomes irrevocable after substantial performance where full performance is assured. The texts cited by petitioner do not fully support this and the cases are against it. In *Petterson* v. *Pattberg*, 248 N. Y. 86, the rule was stated as follows:

> "The act requested to be done, in consideration of the offered promise, was payment in full of the reduced principal of the debt prior to the due date thereof. 'If an act is requested, that very act and no other must be given.' (Williston on Contracts, sec. 73.) 'In case of offers for a consideration, the performance of the consideration is always deemed a condition.' (Langdell's Summary of the Law of Contracts, sec. 4.) It is elementary that any offer to enter into a unilateral contract may be withdrawn before the act requested to be done has been performed. (Williston on Contracts, sec. 60; Langdell's Summary, sec. 4; *Offord* v. *Davies*, 12 C. B. [N.S.] 748.) A bidder at a sheriff's sale may revoke his bid at any time before the property is struck down to him. (*Fisher* v. *Seltzer*, 23 Penn. St. 308.) The offer of a reward in consideration of an act to be performed is revocable before the very act requested has been done. (*Shuey* v. *United States*, 92 U. S. 73; *Biggers* v. *Owen*, 79 Ga. 658; *Fitch* v. *Snedaker*,

> 38 N. Y. 248.) So, also, an offer to pay a broker commissions, upon a sale of land for the offeror, is revocable at any time before the land is sold, although prior to revocation the broker performs services in an effort to effectuate a sale (*Stensgaard* v. *Smith,* 43 Minn. 11; *Smith* v. *Cauthen,* 98 Miss. 746)."

Petitioner does not meet the test laid down by the most liberal text cited, viz. §45 of the Restatement of Contracts:

> "1. A says to B, 'I will not ask you to promise to instal an intra-mural telephone system which will work perfectly in my building, but if you care to try to do it, I will pay you $1000 if you succeed.' B begins the work. When it is partly finished, A revokes his offer. If B can prove that he would have complied with the terms of the offer, he has a right to damages—the contract price less the cost of completing the installation. If B cannot prove that he would have fulfilled the conditions of the offer he cannot recover."

Petitioner cannot prove that he would have ever fulfilled the conditions of the offer, *i.e.,* the recovery and collection of a judgment, of which he would have then been entitled to his moiety. The most that he can say is, that if Congress had not outlawed his action, he might have gone to trial and might or might not have been successful upon the trial and thereafter might or might not have collected some money on behalf of the United States.

Under settled legal principles therefore, petitioner had no vested right under any theory of contract law if there had been an offer of reward by a private person revoked before performance by petitioner of the conditions upon

which the reward was to be paid. *Shuey* v. *United States*, 92 U. S. 73.

Petitioner's claim is, essentially, that the former provisions of the statute created something analogous to an agency to prosecute this action. Under elementary principles of agency law, such a relationship was terminable at will by the principal.

> Restatement of the Law of Agency §118.
> Vol. 1 Mechem on Agency, §§563, 566 (Second Edition).

Petitioner asserts that if his relationship was one of agency it was an agency coupled with an interest because of his anticipated share of the judgment if one was recovered. He cites *Hunt* v. *Rousmanier*, 8 Wheat. 174 and Sections 138 and 139 of the Restatement of Agency. It is elementary that a power coupled with an interest is a power given as security and not to enable the recipient to earn a commission if successful.

> "If, however, the power so given is held for the benefit of the principal and the agent is interested in its exercise only because it entitles him to compensation for exercising it, then even though the principal contracts not to terminate it, and although the agent gives consideration therefor, as by acting or agreeing to act, the power is not a power given as security as the term is herein used." Section 138 Restatement (p. 351).

Hunt v. *Rousmanier*, 8 Wheat. 174, is illustrative. Plaintiff in consideration of a loan to the defendants' intestate of $1,450 was given a mortgage on the intestate's share in a ship. He was also given a power of attorney

authorizing him to sell the interest in the vessel, the power expressly reciting that it was given as security for the payment of the debt. The pleadings conceded that the powers were given "under the belief that they were, and with the intention that they should create, a specific lien and security on the said vessels" (8 Wheat 216). Under these circumstances the Court held that the power of attorney was not subject to revocation but pointed out the distinction between an interest such as the plaintiff in that case had because of his mortgage and an interest such as in the present case which cannot be considered coupled with the agency because it depends upon the exercise of the agency for its existence stating (8 Wheat. 204):

> "The words themselves would seem to import this meaning. 'A power coupled with an interest' is a power which accompanies or is connected with an interest. The power and the interest are united in the same person. But if we are to understand by the word 'interest' an interest in that which is to be produced by the exercise of the power, then they are never united. The power to produce the interest must be exercised, and by its exercise is extinguished. The power ceases when the interest commences, and therefore cannot, in accurate law language, be said to be 'coupled' with it."

In *Taylor* v. *Burns,* 203 U. S. 120, this Court said:

> "As such an instrument it was subject to revocation. It was not a power of attorney coupled with an interest. 'By the phrase "coupled with an interest," is not meant an interest in the exercise of the power, but an interest in the property on which the power is to operate.' *Hunt* v. *Rousmanier's Administrators,* 8 Wheat. 174. Now as we construe this

> contract, Taylor was to receive, in case he made a sale, seven-eighths of the price in excess of $45,000—that is, he was to be paid for making the sale. It was an interest in the exercise of the power and not an interest in the property upon which the power was to operate."

Petitioner's position is no stronger than that of an attorney undertaking the prosecution of a lawsuit on a contingent fee. This relationship may be severed by the client at any time and for any reason (*Martin* v. *Camp*, 219 N. Y. 170). Upon the conclusion of the relationship of attorney and client, the attorney ceases to have any standing whatever or right to proceed against the defendant in the case prosecuted by him. Whatever rights he may have to payment for services rendered up to that time are between him and his former client. They do not extend, as petitioner urges here, to the right to continue to prosecute a claim and collect upon it against his client wishes.

The foregoing shows that, even if petitioner's claim of contract were with a private person, he could acquire no right by the commencement of this action and his relationship was subject to termination at any time.

In the present case, however, we are not dealing with relationships between private persons nor with questions of contract law but with the relationship claimed to exist between the United States and the petitioner by virtue of a statute. The presumption is that a public statute is not intended to create private contractual or vested rights, but merely to declare a policy to be pursued until the legislature shall ordain otherwise (*Dodge* v. *Board of Education*, 302 U. S. 74).

Petitioner's position is certainly no stronger than that of a teacher who retires in the expectancy of receiving a pension pursuant to a law revoked after his retirement and after he had enjoyed the original pension provisions for some time (*Dodge* v. *Board of Education,* 302 U. S. 74). Nor is petitioner in any stronger position than a naval cadet appointed to the Naval Academy under a statute providing for his appointment to a commission in the Navy upon satisfactory completion of his studies, who was denied such an appointment because of an amendment to the statute, passed after he had completed two-thirds of his studies (*Crenshaw* v. *United States,* 139 U. S. 99).

The rule is stated in *Dodge* v. *Board of Education,* 302 U. S. 74, as follows:

> "In determining whether a law tenders a contract to a citizen it is of first importance to examine the language of the statute. If it provides for the execution of a written contract on behalf of the state the case for an obligation binding upon the state is clear. Equally clear is the case where a statute confirms a settlement of disputed rights and defines its terms. On the other hand, an act merely fixing salaries of officers creates no contract in their favor and the compensation named may be altered at the will of the legislature. This is true also of an act fixing the term or tenure of a public officer or an employee of a state agency. The presumption is that such a law is not intended to create private contractual or vested rights but merely declares a policy to be pursued until the legislature shall ordain otherwise. He who asserts the creation of a contract with the state in such a case has the burden of overcoming the presumption."

Petitioner relies upon *Graham and Foster* v. *Goodcell*, 282 U. S. 409. Nothing in that case conflicts with the decision below. The holding of the case was that a tax statute might be applied retroactively to permit the Government to retain taxes collected by it which otherwise would have been recoverable by the taxpayer. The Court stated as a general rule that it is not consistent with due process to take away from a private party a right to recover an amount due when the legislation is passed, but went on to state (p. 429):

> "It is apparent, as a result of the decisions, that a distinction is made between a bare attempt of the legislature retroactively to create liabilities for transactions which, fully consummated in the past, are deemed to leave no ground for legislative intervention, and the case of a curative statute aptly designed to remedy mistakes and defects in the administration of government where the remedy can be applied without injustice."

Petitioner argues (Pet. Br. 25-26) that the withdrawal by Congress of the jurisdiction of the District Court over this case is prohibited by the Fifth Amendment. He admits that Congressional power over the jurisdiction of the United States Courts is undisputed but argues that the action taken in the present case is the taking of his property by indirection and that Congress is without power to take away his remedy under his alleged contract with the United States. The difficulty with petitioner's argument is that this Court has held that Congress can do exactly that. (*Lynch* v. *United States*, 292 U. S. 571.)

There is no question here of a contract between private persons nor is there any question of action by a state pro-

hibited by the Fourteenth Amendment. Petitioner claims on the basis of an alleged implied contract between him and the United States. He makes no assertion of any contract, express or implied, between him and the respondent Anaconda Wire & Cable Company. It is true that this Court has held that a contract between a private person and the United States is protected by the Fifth Amendment against abrogation by Congress. In *Lynch* v. *United States,* 292 U. S. 571, this Court pointed out that Congress had the absolute right to amend or withhold any remedies by which a person might seek to enforce a contract between him and the United States, stating (pp. 580, 581):

> "Third. Contracts between individuals or corporations are impaired within the meaning of the Constitution whenever the right to enforce them by legal process is taken away or materially lessened. A different rule prevails in respect to contracts of sovereigns. Compare *Principality of Monaco* v. *Mississippi, ante,* p. 313. 'The contracts between a Nation and an individual are only binding on th conscience of the sovereign and have no pretensions to compulsive force. They confer no right of action independent of the sovereign will.' "

and at page 582:

> "When the United States creates rights in individuals against itself, it is under no obligation to provide a remedy through the courts. *United States* v. *Babcock,* 250 U. S. 328, 331. It may limit the individual to administrative remedies. *Tutun* v. *United States,* 270 U. S. 568, 576. And withdrawal of all remedy, administrative as well as legal, would not necessarily imply repudiation."

Thus, even if the Court were to find that some implied contract arose out of the former provisions of the False Claims Statute, it is clear that it was not a contract to maintain the District Courts of the United States for the benefit of this petitioner and that the remedies to be granted petitioner under such contract are at the sole discretion of Congress.

CONCLUSION

The petition for certiorari should be denied.

Respectfully submitted,

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